PART 15
TRANSFER OF ASSETS

SECTION 1 TRANSFER OF ASSETS FOR INSTITUTIONALIZED INDIVIDUALS

When an individual disposes of assets for less than fair market value on or after the look back period they may have to serve a penalty period before coverage can begin for institutional level of care services. The services are:

- Nursing facility services
- Nursing facility services in a medical institution
- Home and Community Based Waiver Services

The individual may be eligible for all other Medicaid services.

Section 1.1 Definition of the look back period

For transfers taking place before 2/8/06 the look back period is thirty-six months prior to the month in which the individual is institutionalized and applies for Medicaid.

For transfers taking place on or after 2/8/06 the look back period is sixty months prior to the month in which the individual is institutionalized and applies for Medicaid.

If the individual has had multiple periods of institutionalization and/or applications, the look back period starts with the first date on which the individual was institutionalized and applied for Medicaid.

Section 1.2 Definition of "Individual"

In establishing whether a transfer of assets has taken place, the term "individual" includes the individual him/herself as well as:

I. the individual's spouse; or

II. a person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse or with legal authority to act in place of or on behalf of the individual or the individual's spouse.

Section 1.3 Definition of Assets Subject to Transfer

For transfer purposes, an asset includes all income and resources of the individual and the individual's spouse. This includes any income or resources which the individual or the individual's spouse is entitled to but does not receive because of action or lack of action by the individual as defined above, including but not limited to renouncing an inheritance or failing to exercise a spousal share in a challenge to a will.

To determine the effect that the transfer has on eligibility, several questions must be answered:

I. What was transferred?

II. Who was the transfer made to?

III. When was the transfer made?

IV. What did the individual or couple receive in exchange?

V. Why was the transfer made?

Section 1.4 Exempt Transfers

The following may be transferred without penalty:

I. The home, if it is transferred to:
   A. a child who is under age 21 or who does or would meet SSI criteria of total and permanent disability or blindness;
   B. a sibling who has an equity interest in the home and was residing in the home for at least one year prior to the individual going to the medical institution.

      Example:
      A brother and sister have joint ownership of a home in which they both lived for the last five years prior to the brother going into a nursing facility. The brother may transfer his interest in the home to his sister without penalty.

      A penalty would be established if:
      1. the sister was not a joint owner or had no equity interest in the home, or
      2. the sister had not lived in the home one year prior to the institutionalization of her brother.

   C. a child over age 21 who does not meet the SSI criteria of blindness or disability if the child was residing in the home for at least two years prior to the individual's entering the medical institution and was providing care which enabled the institutionalized individual to live at home rather than a medical institution for this time; or
   D. a spouse.

II. Any asset transferred to the individual's child who does or would meet SSI criteria of total and permanent disability or blindness. This exemption also applies to the transfer of assets by the individual or the individual's spouse to a trust established solely for the benefit of the individual's child who does or would meet the SSI criteria total and permanent disability or blindness.

III. Assets transferred to a trust established solely for the benefit of an individual under 65 years of age who does or would meet the SSI criteria of total and permanent disability.

IV. Assets which the owner intended to dispose of at fair market value or for other valuable consideration but, without being at fault, the owner did not obtain full fair market value.

V. Assets transferred exclusively for a purpose other than to qualify for Medicaid either at the time of the transfer or at some future date. "Exclusively" means, transferred for that reason only and solely. It is not enough to prove that there was a reason to transfer in addition to gaining Medicaid eligibility. The reason for transferring must be exclusive of gaining Medicaid eligibility.

VI. Assets transferred for less than fair market value once all the assets have been returned to the individual. There is no penalty as of the month in which all the assets are returned to the individual. When only part of an asset or its equivalent value is returned, a penalty period can be modified but not eliminated. A penalty remains in effect for the past time period during which the asset had been transferred.

VII. Assets transferred to (or for the sole benefit of) the spouse.

VIII. Assets transferred thirty-six months (sixty months for assets transferred on or after 2/8/06) prior to the month in which the individual is institutionalized and applies for Medicaid. When a transfer involved assets of a trust, the look back period is thirty-six or sixty months (sixty months for all types of trusts after 2/8/06) depending on the type of trust involved (See Part 16, Section 2.52).

IX. Assets transferred for Fair Market value.

X. Irregular or infrequent gifts provided the cumulative amount of the gifts do not exceed $500 per calendar quarter. Each gift is analyzed separately. This provision does not mean that the first $500 per quarter is excluded when the cumulative amount of those gifts is more than $500.

A transfer is considered to be for the "sole benefit of" a spouse, blind or disabled child or disabled individual when no individual or entity except the spouse, blind or disabled child or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any other time in the future.

Section 1.5 Fair Market Value

A transfer for fair market value incurs no penalty. Fair market value may be received in cash by the individual.

Fair Market Value is an amount that can be expected to be received for selling a similar article on the open market in the geographic area involved.

The compensation received for the asset must be in a tangible form with intrinsic value that is equivalent to or greater than the value of the transferred asset. A transfer for love and consideration is not a transfer for fair market value.

Fair market value may be received by the individual in the form of payment of the individual's past medical expenses and debts if measurable and verified. Fair market value must be received by the individual and not delivered at a future date.

Fair market value may also be received in the form of past support for basic necessities if such support is measurable and verified. A reasonable value must be placed on the support provided and the specific time period must be substantiated for which it was given.

Past support for basic necessities does not include any items given as a gift or any services provided by relatives. Past support for basic necessities may include clothing, transportation or personal care provided by a relative only if this clothing, transportation or personal services were provided as part of a legally written enforceable agreement whereby the individual would transfer the asset in payment for clothes, transportation or personal services once those services have been received.

An Individual may only transfer assets for services provided by a relative if the transfer takes place at the time the service is rendered and:

I. the services must be performed after a written agreement has been executed between the applicant and provider. Other provisions stated above continue to apply.

II. at the time of the receipt of the services, the applicant may not be residing in a nursing facility or a CRBH, AFCH, or RCF.

III. at the time of the receipt of the services, the services must have been recommended in writing and signed by the applicant's physician, as necessary to prevent the transfer of the applicant to residential care or nursing facility care. Such services may not include the mere providing of companionship.

IV. at the time of application, the Department will verify the agreement by reviewing the written contract between the applicant and the provider / relative which must show the type, frequency and duration of the services being provided to the applicant and the amount of consideration (money or property) being received by the provider / relative. If the amount paid for the services is above the fair market value of the services at the time the services were delivered, then the applicant will be considered to have transferred the assets for less than fair market value. If in question, fair market value of the services may be determined by consultation with an area business which provides such services.

Section 1.6 Disproving the Presumed Transfer

Any transfer taking place will be presumed to have been made for the purpose of becoming or remaining eligible for Medicaid, unless the individual furnishes clear and convincing evidence that the transaction was for some other purpose and that there was no intent at the time to apply for Medicaid within the foreseeable future. It is the Department's responsibility to demonstrate that a transfer took place and to establish the date of the transfer. It is the individual's responsibility to prove that the transfer took place for reasons other than to gain eligibility for Medicaid.

If the individual wants to disprove the presumption that the transfer was made to establish Medicaid eligibility, the burden of proof rests with the individual. The individual must demonstrate that the transfer was specifically and solely for some other purpose than to receive Medicaid. Statements and evidence to disprove the transfer must be contained in the individual's record.

The statement should cover, but not necessarily be limited to the individual's:

I. purpose for transferring the asset;

II. attempts to dispose of the asset for fair market value;

III. reasons for accepting less than the fair market value for the asset;

IV. plans for and ability to provide financial support after the transfer;

V. relationship, if any, to the persons to whom the asset was transferred; and

VI. belief that the fair market value was received.

In addition to the individual having to prove that the transfer was made specifically and solely for a purpose other than to be Medicaid eligible, other factors to be considered include:

I. a sudden onset of a disability or blindness after the asset was transferred;

II. the diagnosis of a previously undetected disabling condition after the transfer occurred;

III. unexpected loss of other assets following the transfer;

IV. unexpected loss of income after the transfer occurs; and

V. court ordered transfers.

Section 1.7 Establishing Date and Value of a Transfer

This will depend on the type of asset transferred.

I. For assets other than bank accounts a transfer of assets occurs when:
   A. title (ownership) or legal interest to property has passed from the individual to another individual. For example: Sole ownership of a home valued at $100,000 is transferred to another. The value of the transfer is $100,000.
   B. the individual establishes a joint ownership, tenancy in common, joint tenancy or other similar arrangement, such as adding a name to stocks, bonds, or real property. In addition to legally transferring part ownership, the individual has taken action which reduced or eliminated their ownership or control of the remainder of the asset. The date of the transfer is the date that the joint ownership was established. The amount of the transfer is the total uncompensated value of the asset. For example: In 10/05 the individual establishes joint ownership of their home valued at $100,000. The value of the transfer is $100,000. The date of the transfer is 10/05.
   C. the asset is converted from an accessible to an inaccessible asset. An example is when assets are placed in an irrevocable trust.
   D. the individual takes action to refuse the receipt of assets.
   E. unless otherwise exempt, when real property is sold and the individual holds a promissory note, a transfer of assets must be assessed as follows:
      1. if the individual sold property for less than fair market value (see Section 1.5 of this Part), a transfer of assets has occurred amounting to the difference between the sale price (the presumed value of the note) and the value of the property. To determine the sale price the presumed value of the note is used.

2. if the current value of the note is less than the presumed value, the difference between the two amounts is a transfer of assets.

The total amount of assets transferred due to (1) and (2) above incurs a penalty, and the date of the transfer is the date the real property is sold.

F. As of 2/8/06, funds used to purchase a promissory note, loan or mortgage can be considered a transfer of assets unless the note, loan or mortgage**:**
   1. has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Social Security Administration, found online at: http://www.ssa.gov/OACT/STATS/table4c6.html).
   2. provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
   3. prohibits the cancellation of the balance upon death of the lender.

   If the conditions in 1, 2, and 3 above are not met, the value of the transfer is the outstanding balance due on the note, loan or mortgage as of the date of the individual's application for Medicaid.

G. The individual transfers ownership in real property and retains a life estate. In order to determine the value of the transfer penalty refer to Appendix E – Life Estate and Remainder Interest Table. Using the age of the individual at the time of transfer, find the amount in the column of Chart, "Remainder", and multiply it by the fair market value of the property at the time of the transfer. This is the value of the transfer.

H. The individual transfers a life estate interest in real property. In order to determine the value of the transfer penalty refer to Appendix E – Life Estate and Remainder Interest Table. Using the age of the individual at the time of transfer, find the amount in the column, "Life Estate" and multiply it by the fair market value of the property at the time of the transfer. This is the value of the transfer.

I. Purchase of a life estate after 2/8/06. The money used to purchase a life estate interest in another individual's home is considered a transfer of assets, unless the applicant resides in the other individual's home for at least one full and consecutive year beginning on the date of purchase. The value of the life estate must still be calculated in order to determine if the applicant received fair market value for the purchase, regardless of how long the applicant lived in the home. If the applicant paid more than the life estate is worth, then the difference is a transfer for less than fair market value and is subject to a penalty.

II. With bank accounts, a transfer of funds in an account is determined to take place when:
   A. funds, owned by the individual (see Part 16, Section 2.5), are withdrawn by the other joint owner(s) from an account and used for other than the sole benefit of the individual; or

B. another person's name is added to the individual's account, the money in the account is owned by the individual, and the intent of the individual in giving access is to convey ownership of those funds. Intent to convey ownership must be documented with a clearly written statement of intent to transfer the funds in the account to the joint owner. This statement must be:
   1. duly executed in the presence of the notary public; and
   2. signed by the individual at the time the account was made joint or within a reasonable period of time, usually one week but maybe longer due to circumstances beyond the control of the client.

   Note: Evidence of an intent to transfer the funds in the account at the time that the name was added to the account will be rebutted by evidence that the individual continued to use the funds.

Section 1.8 Establishing a Penalty

Once it has been determined that a transfer of assets has occurred for less than fair market value, the penalty period must be determined.

When a penalty is imposed, it is only the long term care services that cannot be paid. The individual may be eligible for all other MaineCare services.

I. The penalty period is determined as follows:
   A. Determine the date that each transfer occurred.
   B. Determine the amount of the transfer.
   C. Divide the amount of the transfer by the average monthly private rate for a semiprivate room for a nursing facility at the time of application (see Chart 4.3). This determines the number of whole months of ineligibility based on the transfer.
   D. For transfers occurring prior to 2/8/06: Any remaining fraction is to be disregarded.
   E. For transfers occurring on or after 2/8/06: When the value of the transfer is less than the average monthly private rate for a semi-private room for a nursing facility in Chart 4.3, or the penalty calculation includes a partial month, the partial month shall be counted and implemented as a period of ineligibility using the following method:
      1. After determining the amount of transfer and dividing that amount by the average monthly private rate for a semiprivate room for a nursing facility, impose a period of ineligibility for the whole months.
      2. Convert the remaining partial month into a dollar amount by multiplying the number of whole months by the monthly private rate used in the calculation above, and subtracting that figure from the total amount of the transfer.
      3. This remainder is added to the cost of care for the first month of eligibility after imposing the penalty period.

      Example:
      If the monthly private rate is $6,000 and the transfer amount is $56,400, this would result in a transfer penalty of 9.4 months. To determine the remainder amount, you would take $6,000 X 9 months = $54,000. $56,400 minus $54,000

= $2,400. You would add $2,400 to the cost of care for one month. If the penalty period begins March 1st, it would end November 30th $2,400 would be added to the cost of care for December.

In an instance where the penalty period is less than a full month the partial month penalty will be added to the cost of care in the first month a cost of care is due.

Example:
Individual enters nursing facility November 27th. There is a partial month transfer penalty of $3000. The first month a cost of care is due is December. The $3000 partial month transfer penalty will be added to the December cost of care.

II. If there has been more than one transfer in the same month, the penalty period is determined as follows:
   A. Determining the total, cumulative, value of all transfers in the same month.
   B. Divide the amount by the average monthly private rate for a semiprivate room for a nursing facility at the time of application (see Chart 4.3). This determines the number of whole months of ineligibility.
   C. For transfers occurring prior to 2/8/06: Any remaining fraction is to be disregarded.
   D. For transfers occurring on or after 2/8/06: When the value of the transfer is less than the average monthly private rate for a semi-private room for a nursing facility in Chart 4.3, or the penalty calculation includes a partial month, the partial month shall be counted and implemented as a period of ineligibility using the following method:
      1. After determining the amount of transfer and dividing that amount by the average monthly private rate for a semiprivate room for a nursing facility, impose a period of ineligibility for the whole months.
      2. Convert the remaining partial month into a dollar amount by multiplying the number of whole months by the monthly private rate used in the calculation above, and subtracting that figure from the total amount of the transfer.
      3. This remainder is added to the cost of care for the first month of eligibility after imposing the penalty period. In an instance where the penalty period is less than a full month the partial month penalty will be added to the cost of care in the first month a cost of care is due.

III. If there have been multiple transfers occurring on or after 2/8/06 in more than one month during the look-back period, all transfers can be added together into one penalty period using the following method:
   A. Accumulate all transfers.
   B. Divide the amount by the average monthly private rate at the time of application for a semiprivate rate for a nursing facility (See Chart 4.3). This determines the number of whole months of ineligibility.
   C. The transfer is treated as one transfer and is treated as if it occurred on the earliest date of the multiple transfers.

D. When the value of the transfer is less than the average monthly private rate for a semi-private room for a nursing facility in Chart 4.3, or the penalty calculation includes a partial month, the partial month shall be counted and implemented as a period of ineligibility using the following method:
   1. After determining the amount of transfer and dividing that amount by the average monthly private rate for a semiprivate room for a nursing facility, impose a period of ineligibility for the whole months.
   2. Convert the remaining partial month into a dollar amount by multiplying the number of whole months by the monthly private rate used in the calculation above, and subtracting that figure from the total amount of the transfer.
   3. This remainder is added to the cost of care for the first month of eligibility after imposing the penalty period. In an instance where the penalty period is less than a full month the partial month penalty will be added to the cost of care in the first month a cost of care is due.

IV. For transfers occurring prior to 2/8/06, the penalty period begins with the month in which the transfer for less than fair market value occurred. If a penalty is already in effect for that month, the penalty period will begin with the next non-penalty month.

The penalty period for transfers made on or after 2/8/06 begins with the later of:

A. the first day of a month in which the transfer for less than fair market value occurred; or
B. the first day of the month the individual is eligible for Medicaid and would otherwise be receiving help with the cost of long term care services based on an approved MaineCare application were it not for the Department imposing an asset transfer penalty period; and
C. the first day which does not occur during any other period of ineligibility.

V. At the time both spouses become institutionalized, have applied for and are otherwise eligible for MaineCare and there is a penalty period in effect for either spouse, the remaining penalty period can be divided between the spouses into any combination of full months. Whether there is a division of the penalty and, if so, how it will be divided, is a decision of the spouses.

When, for some reason, one spouse is no longer subject to a penalty (for example, no longer lives in a nursing facility or dies), the remaining period applicable to both spouses must be served by the remaining spouse.

Section 1.9 Hardship Waiver

The individual applying for help with the cost of nursing facility services or home and community based waiver services may be able to get the period of ineligibility waived if they can show that the transfer penalty places them in an undue hardship situation. It is the responsibility of the individual to prove the claim of undue hardship.

I. Determine if undue hardship exists. An undue hardship exists if this denial would:
   A. deprive the individual of medical care such that the individual's health or life would be threatened; or
   B. deprive the individual of food, clothing, shelter, or other needs of life.

II. Determine whether to waive the penalty when undue hardship exists. The penalty can be waived if:
   A. the individual was exploited as assessed by the Office of Elder Services; or
   B. the individual can prove all of the following:
      1. Neither the individual nor the spouse have the means to pay for the cost of nursing facility or home and community based waiver services, taking into consideration all exempt and non-exempt income and assets.
      2. The recipient of the transferred asset is unable or unwilling to make the value of the transfer or any part of it available to pay for the individual's cost of nursing facility or home and community based waiver services.
      3. The individual has made all reasonable efforts to recover the transferred asset or its equivalent value. The individual must cooperate with the Department in any recovery activity that is undertaken.
      4. The individual must agree in writing that if the transferred assets or equivalent value are recovered, the individual will reimburse Medicaid for funds expended as a result of the approved claim of undue hardship.

III. The result of being denied Medicaid for nursing facility services or home and community based waiver services, by itself, is not considered undue hardship.

IV. The Department will use the following process for undue hardship determinations:
   A. All denials/closures due to a transfer of assets will include a written notice that an "undue hardship" provision exists and can be considered according to the criteria indicated above if the applicant/recipient requests it.
   B. A claim of undue hardship must be made no later than thirty days from the date of the denial/closure notice. With the individual's written permission, an authorized representative or the facility in which the individual resides can claim undue hardship on the individual's behalf.
   C. A decision on a claim of undue hardship will be made and the applicant notified in writing within thirty days of the claim being made.
   D. An appeal from any adverse action including a denial of a claim of undue hardship must be made within thirty days of the notice of denial. Applicants/recipients will be given written notice of this right to a hearing.
   E. In II. B.1. above, the Department will not use income and assets provided to the community spouse to prevent impoverishment in determining whether the individual or the spouse have the means to pay the cost of long term care services in the facility.

(Part 15, Section 2, Parts 2.1 through 2.9 are deleted)